STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 11, 2000
v PETER ROBERT WEBB, Defendant-Appellant.	No. 205788 Ottawa Circuit Court LC No. 97-020671 FH

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v DANNY CLARE BOSS, JR., Defendant-Appellant.	No. 207023 Ottawa Circuit Court LC No. 97-020667 FH

Before: Zahra, P.J., and Kelly and McDonald, JJ.

PER CURIAM.

In Docket No. 205788, defendant Peter Robert Webb appeals by right from his bench trial convictions of escape from jail while awaiting trial, MCL 750.197(2); MSA 28.394(2), escape from jail through the use of violence, MCL 750.197c; MSA 28.394(3), and felonious assault, MCL 750.82; MSA 28.277. Defendant Webb was sentenced as a third-offense habitual offender, MCL 769.11; MSA 28.1083, to forty-eight to ninety-five months' imprisonment for each conviction.

In Docket No. 207023, defendant Danny Clare Boss, Jr. appeals by right from his jury trial conviction of aiding the escape of a prisoner, MCL 750.183; MSA 28.380. Defendant Boss was sentenced as a fourth-offense habitual offender, MCL 769.12; MSA 28.1084, to three to ten years' imprisonment. In each case, we affirm.

Docket No. 205788

I

Defendant Webb first argues that his dual convictions of both escape from jail through the use of violence and felonious assault violates the constitutional prohibition against double jeopardy. US Const, Am V; Const 1963, art 1, § 15. Because defendant did not raise this issue below, it is unpreserved and subject to the plain error rule. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, a defendant must satisfy three requirements: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights, in other words, the error affected the outcome of the lower court proceedings. *Id*. at 763. Defendant has failed to show that error occurred in this case.

Double jeopardy issues constitute questions of law and are reviewed de novo on appeal. *People v Walker*, 234 Mich App 299, 302; 593 NW2d 673 (1999).

At the time of the escape, MCL 750.197c; MSA 28.394(3), provided:

> A person lawfully imprisoned in a jail . . . or awaiting . . . trial, . . . or charged with a crime or offense who, . . . through the use of violence, threats of violence or dangerous weapons, assaults an employee of the place of confinement . . . or breaks the place of confinement and escapes, . . . is guilty of a felony.

The felonious assault statute, MCL 750.82(1); MSA 28.277(1), provides:

> Except as provided in subsection (2), a person who assaults another person with a gun, revolver, pistol, knife, iron bar, club, brass knuckles, or other dangerous weapon without intending to commit murder or to inflict great bodily harm less than murder is guilty of a felony[.]

In *People v Lugo*, 214 Mich App 699, 706; 542 NW2d 921 (1995), this Court summarized the standards regarding double jeopardy enunciated by our Supreme Court in *People v Robideau*, 419 Mich 458, 485; 355 NW2d 592 (1984):

> Cumulative punishment of the same conduct does not necessarily violate the prohibition against double jeopardy under either the federal system or the state system. The determinative inquiry is whether the Legislature intended to impose cumulative punishment for similar crimes.
>
> Determination of legislative intent involves traditional considerations of the subject, language, and history of the statutes. The court should consider whether each statute prohibits conduct violative of a social norm distinct from the norm protected by the other, the amount of punishment authorized by each statute, whether the statutes are

> hierarchical or cumulative, and any other factors indicative of legislative intent. [Citations omitted.]

See also *Walker, supra* at 308-309.

The statute penalizing escape from jail through violence "is obviously aimed at preventing violent jail breaks or escapes by those confined within." *People v Cousins*, 139 Mich App 583, 596; 363 NW2d 285 (1984). "The assault statutes, however, are clearly intended to punish crimes against persons." *Lugo, supra* at 708. "Statutes such as these which prohibit conduct violative of distinct social norms generally permit multiple punishments." *Cousins, supra* at 596. Pursuant to this reasoning, defendant's convictions do not violate double jeopardy principles.

In order to convict defendant of escape from jail through violence, the prosecutor was required to prove that: (1) defendant was confined to jail; (2) he was legally confined there; (3) he broke out of jail and escaped; and (4) he did so by using violence. CJI2d 13.14. To convict defendant of felonious assault, the prosecutor was required to prove that: (1) defendant either attempted to commit a battery on the corrections officer or did an illegal act that caused her to reasonably fear an immediate battery; (2) he intended either to injure the officer or to make her reasonably fear an immediate battery; (3) at the time, he had the ability to commit a battery, appeared to have the ability, or thought he had the ability; and (4) he committed the assault with a dangerous weapon. CJI2d 17.9. Comparing the elements of each offense, it does not appear that either crime is a lesser included or cognate offense of the other. *Cousins, supra* at 596-597. This constitutes another reason favoring the conclusion that defendant's conviction under both statutes does not contravene the prohibition against double jeopardy.

II

Defendant Webb next contends that the prosecution did not prove that, at the time of the escape, he was lawfully incarcerated in the Ottawa County jail. Although it is true that one element of the crime of escape from jail through violence is that the defendant was lawfully incarcerated, CJI2d 13.14, there is simply no issue regarding the satisfaction of that element in these cases. The supervisor of general operations in the sheriff's department corrections division testified that computer records showed that, at the time of the escape, all of the escapees were in jail awaiting hearings in circuit court on various felony charges. Furthermore, the parties stipulated that, at the time of the escape, defendant Webb was in jail awaiting a felony trial. Therefore, this element of the crime was amply satisfied by the evidence.

Docket No. 207023

I

Defendant Boss first argues that the trial court erred by denying his pretrial motion for a forensic examination. MCL 768.20a(1); MSA 28.1043(1)(1), provides, "If a defendant in a felony case proposes to offer in his . . . defense testimony to establish his . . . insanity at the time of an alleged offense, the defendant shall file and serve upon the court and the prosecuting attorney a notice in writing

of his . . . intention to assert the defense of insanity not less than 30 days before the date set for the trial of the case . . . ." Defendant concedes that he did not move for a forensic examination until July 11, 1997, four days before the commencement of trial, but attributes the delay to the fact that he had a breakdown in the attorney-client relationship with his first counsel to the extent that the attorney had to withdraw, and claims that he asked his first counsel to move for allowance of a forensic evaluation, but counsel would not do so. However, nothing in the evidence produced at the hearing on this motion confirms defendant's allegation that he had in fact made such a request of his first counsel. The trial court denied the motion on that ground and on the additional ground that nothing in the evidence or in defendant's appearance supported the conclusion that he needed a forensic evaluation. Even so, the court offered to grant defendant's request and adjourn trial if he could "produce written evidence that he has made that request to [his first counsel] so that it could have been timely made." There is no indication in the record that defendant ever produced the required evidence.

Defendant's reliance on *People v Chapman*, 165 Mich App 215; 418 NW2d 658 (1987), is misplaced. In *Chapman*, the defendant, three months before trial, petitioned for a psychiatric evaluation to determine his criminal responsibility and ability to assist counsel in preparing a defense. This Court held that "the petition requesting a psychiatric evaluation was sufficient notice of defendant's intent to assert an insanity defense." *Id.* at 217. Such being the case, the trial court in *Chapman* erred by denying the defendant's petition because MCL 768.20a(2); MSA 28.1043(1)(2), provided that upon receipt of a notice of intention to assert an insanity defense, "a court shall order the defendant to undergo an examination relating to his . . . claim of insanity . . . ." *Id.* at 218. In the case at bar, however, there was no timely notice of intention to file an insanity defense, and the trial court therefore did not abuse its discretion by denying defendant's motion for a forensic evaluation, filed only four days before trial was scheduled to begin.

II

Defendant Boss next contends that prejudicial error occurred when the trial court allowed the prosecution to impeach him with a 1988 conviction for breaking and entering with intent to commit larceny. We disagree. A witness' credibility may be impeached with prior convictions, MCL 600.2159; MSA 27A.2159, but only if the convictions satisfy the criteria set forth in MRE 609. *People v Nelson*, 234 Mich App 454, 460; 594 NW2d 114 (1999). The crime at issue here is minimally probative, *People v Bartlett*, 197 Mich App 15, 19; 494 NW2d 776 (1992), and is admissible only if its probative value outweighs its prejudicial effect, *People v Allen*, 429 Mich 558, 595-596; 420 NW2d 499, amended *People v Pedrin*, 429 Mich 1216 (1988). MRE 609(a)(2)(B) provides that a prior conviction may not be used to impeach unless "the court determines that the evidence has significant probative value on the issue of credibility and, if the witness is the defendant in a criminal trial, the court further determines that the probative value of the evidence outweighs its prejudicial effect." Additionally, MRE 609(b) states:

> For purposes of the probative value determination required by subrule (a)(2)(B), the court shall consider only the age of the conviction and the degree to which a conviction of the crime is indicative of veracity. If a determination of prejudicial effect is required, the court shall consider only the conviction's similarity to the charged

> offense and the possible effects on the decisional process if admitting the evidence causes the defendant to elect not to testify. The court must articulate, on the record, the analysis of each factor.

The record discloses that the trial court erred by allowing use of the challenged conviction without engaging in the balancing test required by MRE 609(a)(2)(B) and 609(b), and without regard to *Allen, supra*. However, the erroneous admission of a prior conviction may be harmless if, despite the error, the prosecutor's case was so strong that a reasonable juror would not have voted to acquit if the impeachment evidence had been suppressed. *People v Reed*, 172 Mich App 182, 188; 431 NW2d 431 (1988). More recent authority indicates that reversal is not warranted unless it affirmatively appears after an examination of the entire cause that it is more probable than not that the error was outcome-determinative. *Carines, supra* at 774; *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). Under either formulation of the standard, we are satisfied that reversal is not warranted on the basis of this issue.

III

Defendant Boss also alleges that the trial court erred by permitting the prosecutor to cross-examine him regarding a letter that he and another inmate wrote to jail authorities before the escape, criticizing the two guards on duty at the time of the escape. Because defense counsel objected to the letter solely on the ground of relevance, we confine our analysis to that issue.

The decision whether to admit or exclude evidence is within the trial court's discretion and will only be reversed on appeal where there is an abuse of discretion. *Lukity, supra* at 488. This Court will find an abuse of discretion only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *Lugo, supra* at 709. Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the action more probable than it would be without the evidence. MRE 401; *People v Campbell*, 236 Mich App 490, 503; 601 NW2d 114 (1999), lv pending. Under this broad definition, evidence is admissible if it is helpful in throwing light on any material point, *People v Kozlow*, 38 Mich App 517, 524-525; 196 NW2d 792 (1972), and all facts on which any reasonable presumption of the truth or the falsity of a charge can be founded are admissible, *People v Lewis*, 264 Mich 83, 88; 249 NW 451 (1933). In this case, the letter was relevant to show defendant's animosity toward the two corrections officers beaten during the escape, thus tending to negate the contention that the escape plan intended no harm or violence toward the guards. It was also relevant to suggest that defendant himself had no inhibitions against participating in the escape or using violence against the guards, based on his dislike for them expressed in the letter. The trial court therefore did not abuse its discretion in admitting this document.

IV

Defendant Boss further maintains that the trial court improperly admitted into evidence statements that a codefendant made to the police, inculpating defendant. Defense counsel objected on the basis of *Bruton v United States*, 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968), but

conceded that he would have no basis for his objection if the codefendant testified at trial, which he did. No error therefore occurred.

V

Defendant Boss next argues that the trial court's jury instructions were defective in three ways. He first alleges that "adding . . . a line at the end of each of the elements relating to the defendant or a third party or another person, would be appropriate in the facts of this case," and adds that "not having the third-party element added into the duress instructions has deprived [defendant] of the legal cognizable instruction and defense." Because defendant does not explain, either in the lower court record or on appeal, the nature of this objection and cites no authority supporting it, any argument associated with this issue has been abandoned. *People v Piotrowski*, 211 Mich App 527, 530; 536 NW2d 293 (1995).

Defendant next objects to the trial court's inclusion in its instruction on assisting the escape of a prisoner the statement, "It does not matter how much advice, help or assistance the defendant gave. However, you must decide whether the defendant intended to help another commit the crime of escape and whether his help or advice or assistance actually did help, advise, or assist in the commission of the crime." This is essentially the "Inducement" instruction of CJI2d 8.4, and, according to the commentary to that instruction, derives from *People v Palmer*, 392 Mich 370, 378; 220 NW2d 393 (1974), and *People v Washburn*, 285 Mich 119, 126; 280 NW 132 (1938). Although the trial court did not indicate why it included this instruction at this point in its charge to the jury, no error warranting reversal appears under either *People v McFall*, 224 Mich App 403, 412-413; 569 NW2d 828 (1997), or *Lukity, supra* at 495-496.

Defendant thirdly contends that error occurred because the trial court used a nonstandard instruction relating to the offense of duress. We disagree. The challenged instruction closely follows the duress instruction found at CJI2d 7.6 and deviates from the standard instruction in only two particulars. First, the court added to element four the words "and the threatening conduct was present, was imminent and impending and not a threat of future injury." The court also added element five, that "the threat must have arisen without the negligence or fault of the defendant." Both of these additions are taken directly from the language of *People v Lemons*, 454 Mich 234, 246-247; 562 NW2d 447 (1997), and *People v Merhige*, 212 Mich 601, 610-611; 180 NW 418 (1920). The instruction is not erroneous because it fairly presents the issues to be tried and sufficiently protects defendant's rights. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). Nor is reversal required under the standard enunciated in *Lukity, supra*.

VI

Defendant Boss further contends that the evidence is insufficient to support his conviction of aiding the escape of a prisoner. In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). The elements of the crime of aiding the escape of a prisoner, MCL 750.183; MSA 28.380, as given by the trial court in its jury instruction and in conformity with CJI2d 13.7, are: (1) that the other escapees were prisoners in the Ottawa County jail; (2) that they were legally committed or held in the jail; and (3) that defendant

intentionally assisted a prisoner who was trying to escape–it does not matter whether the escape itself was made or even attempted, but he must have intended to assist the prisoner escape.

Ample evidence exists in the record warranting a rational trier of fact in finding that the essential elements of the crime were proven beyond a reasonable doubt. *Wolfe, supra*. Regarding elements one and two, there is no question that all escapees were legally incarcerated in the Ottawa County jail at the time of the escape. Regarding the third element, evidence in the record, if believed, is sufficient to show that defendant Boss not only initiated the idea of an escape and planned it, but also voluntarily assisted the others' escape by holding the doors open to permit their egress. The evidence is sufficient to support defendant's conviction.

Defendant's discussion of this issue focuses in part on the jury's rejection of his affirmative defense of duress. The trial court clearly instructed the jury, "If you find that the prosecutor has not proven beyond a reasonable doubt that the defendant was not acting under duress, then you must find the defendant not guilty." Clearly, evidence adduced at trial was sufficient to permit the jury's conclusion that plaintiff had negated defendant's duress defense beyond a reasonable doubt and that he planned the escape and/or voluntarily participated in it and assisted the others' escape. There was no error.

VII

Defendant Boss next challenges this Court's earlier denial of his motion to remand this case to the trial court for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). This Court's March 5, 1999, order states that defendant's motion to remand was denied because

> the motion is untimely and because defendant has failed to demonstrate by the affidavits presented that a remand is warranted to develop facts outside the record in support of defendant's claims.

Defendant now asserts that this Court erred in denying his motion to remand because, contrary to what this Court previously determined, the motion was not untimely, and further, that he "made a sufficient showing in his affidavits in support of the motion to remand to justify the holding of an evidentiary hearing on the claim." While there is merit to defendant's claim that the motion was timely,[1] the previous panel's determinations that the motion was untimely and that defendant's affidavits were insufficient to demonstrate that a remand was warranted constitute the law of the case. Accordingly, we are precluded from reviewing these issues further. *People v Hayden*, 132 Mich App 273, 297; 348 NW2d 672 (1984); *People v Douglas*, 122 Mich App 526, 529-530; 332 NW2d 521 (1983); *People v Wiley*, 112 Mich App 344, 346; 315 NW2d 540 (1981). Defendant's redress, if he disagreed with the prior panel's decision, was to file a motion for rehearing directed to the deciding panel or file an application for leave to appeal to our Supreme Court. *Douglas, supra* at 530.

VIII

Finally, defendant Boss alleges that the trial court abused its discretion by sentencing him to a prison term of three to ten years. A sentence must be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990). Where, as here, an habitual offender's underlying felony and criminal history demonstrate that he is unable to conform his conduct to the law, a sentence within the statutory limits is proportionate. *People v Hansford (After Remand)*, 454 Mich 320, 326; 562 NW2d 460 (1997). The trial court did not abuse its discretion.

Affirmed.

/s/ Brian K. Zahra
/s/ Michael J. Kelly
/s/ Gary R. McDonald

[1] After defendant filed his motion to remand, this Court granted defendant's motion to extend the time period for filing his brief. In light of this subsequent order, it appears that defendant's motion to remand may be considered timely.